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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

ATLANTIC COAST LINE RAILROAD COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

Decision Below.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above styled case May 4, 1954, rehearing denied July 13, 1954 (128 Ct. Cl. .....; 120 F. Supp. 917; R. 39; Appendix "A" hereof), which judgment granted Respondent's amended motion to dismiss Petitioner's petition, based upon the purported lack of jurisdiction of the court below.

Jurisdiction.

The judgment of the Court of Claims having been entered May 4, 1954 (R. 39) and that Court having on July 13, 1954, denied a rehearing (R. 45), the jurisdiction of this Court is invoked under 28 U. S. Code, Sec. 1255(1), and Rule 19(2) of this Court, this petition being timely filed under 28 U. S. Code, Sec. 2101(c).

Questions Presented.

The Court below erred in the following particulars:

(1) In holding that Petitioner's claim is one which falls within the purview of the Suits in Admiralty Act, 46 U. S. C., Sec. 741 *et seq.*, 41 Stat. 525, over which the federal district courts have exclusive jurisdiction (R. 44).

(2) In holding that notwithstanding the termination and cancellation of the charter party and the bankruptcy of the charterer,

(a) that contract still governed (R. 41);

(b) that the vessels covered by such agreement retained their merchant status until the Navy took physical possession thereof (R. 43); and

(c) that the obligation sued upon arose as an incident of the employment of the vessels as merchant vessels (R. 44).

Statutes Involved.

The pertinent constitutional provisions and statutes involved herein, i. e.:

(1) Fifth Amendment to the Federal Constitution;

(2) The Suits in Admiralty Act, 46 U. S. Code, Sec. 741 *et seq.*, 41 Stat. 525;

(3) Extension of the Admiralty & Maritime Jurisdiction Act, 46 U. S. Code, Sec. 740, 62 Stat. 496;

(4) Act providing for the Jurisdiction of the Court of Claims, 28 U. S. Code, Sec. 1491, 62 Stat. 940;

(5) Chapter 271.01, Florida Statutes;

as set out in Appendix "B", pp. 23 to 28.

Statement of the Case.

On October 7, 1949, the Government, acting for the Navy Department, entered into a charter party with East Coast Shipping Company under which the latter agreed to perform barge service between Jacksonville, Florida and the Navy's Banana River Base located on the mid-east coast of Florida, using Government tugs and barges.

In the performance of that contract the Shipping Company transferred cargo from railroad cars to such barges and vice versa, over Petitioner's wharf at Jacksonville, Florida. Tariffs covering the prior and subsequent rail movements of such shipments provided that the wharfage charges for the use of Petitioner's dock facilities would be absorbed in such rates, and no separate wharfage charges were assessed or collected by reason of such operations (R. 40).

On October 4, 1950, due to financial losses, the Shipping Company notified the Navy Department of its election to terminate that contract, coupling such notice with a request that the Navy issue directions for the redelivery of such barges to the Navy as required by Article 17 of the charter[1].

The Navy rejected the right of the Shipping Company to terminate the agreement in that manner "since Article 11(2) provides that you may not cancel such contract at a time when you are in default" (R. 31; letter from Navy to

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[1] Article 17: REDELIVERY OF VESSELS. On or before the expiration or promptly following the termination of this charter party, as the case may be, Charterer at its expense shall redeliver the vessels in as good condition as when delivered to the Charterer, normal wear and tear excepted, to the location shown on Schedule 1 hereof or to such other locations within the Sixth Naval District, as may be designated by the Government, * * *. Upon completion by the Charterer of its obligations under this Article, the Government shall execute redelivery certificates covering each of the vessels so redelivered.

East Coast Shipping Company dated October 18, 1950). And thereupon the Navy exercised its right under Article 18[2] to terminate the charter party, such cancellation to be "effective upon receipt" of such notice, the Shipping Company being directed to redeliver the vessels at specified locations. Upon redelivery the vessels were to be placed "in a state of deactivation" (R. 31) in accordance with instructions to be furnished.

Admittedly the barges were no longer to be engaged in commerce. The Navy further admitted (R. 14) its awareness that the Shipping Company had been adjudicated a bankrupt as of October 27, 1950. The charter party having been cancelled by the Government nine days earlier, the Trustee was thus divested of any election to continue or reject the contract.

Meanwhile, on October 4, 1950, twelve of such barges were moored in dead storage at Petitioner's wharf at Jacksonville, and on January 10, 1951, three additional barges were moored at said dock; thereafter, these fifteen vessels remained at Petitioner's wharf until February 19 to 21, 1951, when they were removed by the Navy.

On August 23, 1951, Petitioner rendered its bill to the Navy Department, accompanied by letter of that date, claiming wharfage charges for the use of its facilities for the period during which the vessels remained moored at Petitioner's dock (R. 5). Upon the Navy's refusal to pay

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[2] Article 18: In the event Charterer shall fail to comply with any of the covenants, agreements, stipulations or conditions of this charter party, the Government, without waiver of and in addition to such other rights as it may have, may terminate this charter party and take possession of the vessels without notice, in which event the Government shall not be liable in damages or otherwise by reason of such termination and seizure. The termination of this charter party under this Article 18 shall not deprive the Government of any action, right or remedy against Charterer for possession, hire or damages nor shall receipt of hire after default by Charterer be deemed a waiver by the Government of any right or action hereunder.

such bill this proceeding was instituted in the Court of Claims, the jurisdiction of that court being invoked by reason of 28 U. S. Code, Sec. 1491, subsections (1) and (4),[3] to enforce Petitioner's claim against the United States under the Fifth Amendment to the Federal Constitution, and based upon a contract implied in fact.

By amended motion to dismiss Respondent challenged the jurisdiction of the court below, upon the assertion that Petitioner's claim is a maritime lien or contract enforceable only under the Suits in Admiralty Act, over which the federal district courts have exclusive jurisdiction.

Argument.

This court in the exercise of its supervision over the inferior federal courts should clearly define the limits of the exclusive grants of power invested in the Court of Claims on the one hand, and the Federal District Courts under the Suits in Admiralty Act on the other hand.

The decision of the Court below is in direct conflict (a) with the decisions of this Court; (b) with the decisions of the Federal Courts of Appeal; and (c) with its own decisions.

The judgment below constitutes such a gross departure from fundamental principles of law as to call for the exercise by this Court of its power of supervision over the inferior federal courts.

The dismissal of this action by the Court below has deprived Petitioner of its property without due process and

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[3] Section 1491. CLAIMS AGAINST THE UNITED STATES generally: The United States Court of Claims shall have jurisdiction to render judgment upon any claim against the United States—

(1) founded upon the Constitution; or

* * * * * *

(4) founded upon any express or implied contract with the United States; or * * *

without compensation, and leaves it without any enforceable remedy, since Petitioner's claim at the time of the entry of the judgment below had become barred by the applicable statutes of limitation.

We respectfully assert that the Court of Claims has jurisdiction, and should have exercised jurisdiction of this proceeding, that issue not being open to doubt when related to the cause of action here sued upon. The question should be settled; moreover, for the benefit of future litigants, for the citizens and tax payers of the country who must innocently deal with the various agencies of the Government, sometime without their consent, as in this instance, should not be left in doubt concerning the rights and remedies which are available and which must be pursued.[4]

The Suits in Admiralty Act (Title 46, U. S. Code, Sec. 741, *et seq.*) provides that a libel may be brought against the United States "in cases where if such vessel were privately owned or operated • • • a proceeding in admiralty could be maintained". Under that law as originally enacted the admiralty jurisdiction did not extend to maritime causes of action which affected structures fixed to the shore, such as bridges, docks and wharves, and it was not until the enactment of Title 46, U. S. Code, Sec. 740[5]—the

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[4] In the *Calmar* case (345 U. S. 446, 97 L. Ed. 1140) this Court in footnote 7 recognized the problem which confronts a litigant in selecting the forum to enforce claims of this nature, and observed that he cannot hedge by filing a suit simultaneously in the Court of Claims with one under the Suits in Admiralty Act in one of the district courts.

[5] §740. EXTENSION OF ADMIRALTY AND MARITIME JURISDICTION; LIBEL IN REM OR IN PERSONAM; EXCLUSIVE REMEDY; WAITING PERIOD.

> The Admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.
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> • • • • • •

so-called Extension of the Admiralty and Maritime Jurisdiction—that the admiralty jurisdiction was enlarged to include cases for damage or injury done or consummated on land. That section is not a part of the Suits in Admiralty Act, and its language which must be strictly construed does not lend itself to the interpretation that *all* maritime causes of action affecting structures fixed to the shore shall come within the scope of the admiralty jurisdiction. By its very terms Section 740 is limited to tort actions for the *damage* or *injury* done or consummated on land, caused by a vessel on navigable water.

Where Petitioner's cause of action was founded upon the prohibition contained in the Fifth Amendment to the Federal Constitution and upon a contract implied as a matter of fact, the court below was without authority to reframe Petitioner's theory into the narrow scope of admiralty, particularly when the only legislative authority which extends the admiralty jurisdiction to claims relating to structures attached to the shore is limited to *tort* claims.

The limited extension of jurisdiction under the Suits in Admiralty Act by the enactment of Title 46, U. S. Code, Section 740, could have no possible application to the *non-tortious* cause of action here sued upon.

Being a matter of first impression, the interpretation of the scope of Section 740 should receive the attention of this Court.

Non-Maritime Nature of Cause of Action Sued Upon.

In holding that the obligation sued upon arose as an incident to the employment of the barges as instruments of commerce, the Court below overlooked the cardinal principle that no maritime lien arises where a vessel is kept at the wharf merely for the purpose of storage. Judge

Frank in *Murray* v. *Schwartz, et al.*, 175 F. 2d 72, (CA 2 1949), reiterated the time-honored rule that

> "A wharfage contract touching a dead ship is not maritime, and a contract which is not maritime can not create a lien subject to the jurisdiction of admiralty. The Poznan, 2 Cir. 9 F. 2d 838, 842-843; Robinson, Admiralty, 180".

The author of the decision here sought to be reviewed relied upon *Ex parte Easton*, 95 U. S. 68, 24 L. ed. 373 (1877), to support his view that claims for wharfage have long been recognized as maritime in nature, subject to the admiralty jurisdiction. He failed to recognize that "where a vessel has been withdrawn from commerce and navigation, and is laid up at a wharf for storage, such wharfage does not constitute a maritime contract of which admiralty has jurisdiction"—30 Am. & Eng. Ency. of Law, p. 496.

In the *Easton* case this Court did not exclude the reasoning that wharfage might be non-maritime under different circumstances.

> "The important thing is to inquire whether the claim asserted arose out of the employment in merchant service of a vessel owned by or in the possession of the United States."

and:

> "Instances may, doubtless, be referred to where wharves are erected as sites for stores and storehouses;"

implying that a different rule would apply under different circumstances.

The court below thus failed to recognize that wharfage is of two varieties, maritime and non-maritime. Where a

vessel is tied to a dock directly in connection with the loading or discharge of cargo or passengers, or for repairs, or for any purpose preceding or following an actual voyage, wharfage charges unquestionably would be maritime in nature.

In Hughes on Admirality, 2nd Ed. 22, the rule is stated in this language:

> "The same transaction may be maritime in one case and not maritime in another. As emphasizing this distinction, there is the maxim that 'a ship is made to plough the seas, and not to lie at the walls'. Hence wharfage rendered to a ship while loading or unloading, or in her regular use as a freight-earning enterprise, is a maritime contract. On the other hand, wharfage to a ship laid up for the winter while waiting for the season to open is not maritime".

And again in the vivid language of Judge E. B. Thomas:

> "But if an empty ship be tied to a wharf, because her field of operation is closed by ice, or because she is taken away from navigation, the case is widely different. She is at the wharf for no purpose of navigation, but for the precise purpose of non-navigation, and because navigation is not contemplated. She is not at the dock for passengers, for freight, for repairs, or any purpose preceding or succeeding the actual voyage. She is not there for rest, even in the sense of lying up for some preparation for another voyage, or reparation from a voyage ended; but the sole reason of her presence at the wharf is that she has gone out of commission, withdrawn temporarily from navigation, abandoned for the time the purpose of her construction, because the locality of her journeying positively prohibits the continuance of such occupation, or because there is no

> occasion or opportunity for her use. The mariners are discharged, the boat is shut up, like a closed house, and is left in idleness to a caretaker or watchman, and so remains until the owner sees fit to withdraw her from this state of suspension for her appropriate use." (*The C. Vanderbilt,* 86 F. 785 (D. C. E. D. N. Y. 1898.))

As we have shown, the barges involved in this proceeding had completely ceased to plough the seas; they were lying at Petitioner's dock in utter repose and inactivity, not for the purpose of navigation, but for the purpose of non-navigation. The Shipping Company had been declared a bankrupt; its assets had been taken over by a Trustee (R. 40), it was powerless to effect actual redelivery of the vessels to the Navy; the vessels had been abandoned by it and by the Trustee in Bankruptcy as well. Furthermore, the Navy by its unilateral termination of the charter party under Article 18, *supra,* effectively settled any possible doubt concerning the complete cancellation of the contract. Thereafter, the barges were no longer vessels of commerce, and while occupying Petitioner's wharf were consigned to the limbo of dead storage, over which admiralty could have no possible jurisdiction.

In footnote 8 to the *Calmar* case (*Calmar S. S. Corp.* v. *U. S.,* 345 U. S. 446, 97 L. ed. 1140, 73 S. Ct. 733) this court expressly held:

> "It is not our task, of course, to torture the Suit in Admiralty and Public Vessels Act into an all-inclusive grant of jurisdiction to the District Courts".

The court has long recognized that the expropriation of a wharf like the taking of any other property entitles the

owner to just compensation. *Weems Steamboat Co.* v. *Peoples' Steamboat Co.*, 214 U. S. 345, 53 L. ed. 1025 (1909):

> "• • • A private wharf on a navigable stream is thus held to be property which cannot be destroyed or its value impaired, and it is property the exclusive use of which the owner can only be deprived in accordance with established law; and if necessary that it or any part of it be taken for the public use, due compensation must be made.
>
> "• • • There is no more reason why such property should be held subject to the right of others to use it against the will of its owner than there is for any other kind of property to be so held."

Chapter 271.01, Florida Statutes (Appendix B) vests full title in the upland riparian proprietor to the submerged lands covered by water lying in front of his property as far as the edge of the channel and expressly grants to him the full right and privilege to build wharves into the stream as far as may be necessary for his proper enjoyment.

Local law governs the rights of the riparian owner (*Weems Steamboat Co.* v. *People's Steamboat Co., supra*). In Florida the law is well settled that the owner of a private wharf may make a reasonable charge for the use of his dockage facilities, and, even where such wharf is used without express agreement, the law implies one to pay just and reasonable charges. *Bagdad Land and Lumber Co.* v. *Louisville and Nashville,* 172 So. 851 (Fla., 1937).

Jurisdiction of Court of Claims to Award Compensation for Unlawful Taking.

While the vessels so remained idle at Petitioner's wharf Petitioner was deprived of its property without just compensation just as effectively as though the Government had

taken physical possession of its wharf and expropriated it to its own use.

In the absence of an express contract Petitioner is claiming compensation upon a *quantum meruit* for the reasonable value of its property.

> "Compensation for wharfage may be claimed upon an express or an implied contract, according to the circumstances. Where a price is agreed upon for the use of the wharf, the contract furnishes the measure of compensation; and when the wharf is used without any such agreement, the contract is implied, and the proprietor is entitled to recover what is just and reasonable for the use of his property and the benefit conferred".
>
> *Ex Parte Easton, supra;*
> *Silas Mason Co.* v. *United States,* 116 Ct. Cl. 1 (1950).

Repeated requests upon the Navy to remove the vessels were ignored, and Petitioner was not at liberty to cast them adrift to become derelicts upon the ebb and flow of the tide; Petitioner felt an obligation to protect and preserve the property of the United States, notwithstanding that their continued trespass effectively operated to deprive Petitioner of its property, and the right to enjoy the commercial use of such wharf for the normal purpose of loading and unloading cargo vessels to and from railroad cars upon Petitioner's tracks adjacent thereto.

In a proceeding filed in the Court of Claims entitled *Daniel C. Robinson, Inc.* v. *United States,* 95 F. Supp. 236, 118 Ct. Cl. 414 (1950), plaintiff sought compensation for the taking of the use of its two barges and for the taking of its interest as bareboat charterer in a tug. There the vessels were actively employed in commerce so that the

admiralty jurisdiction was infinitely more apparent than in the instant proceeding; yet the Court of Claims took jurisdiction and awarded damages for the claimed *loss of use* under the Fifth Amendment. Patently there is a direct conflict between that decision and the ruling here sought to be reviewed.

The fact that a taking may be temporary does not prevent it from being compensable under the Fifth Amendment.

> *United States* v. *General Motors Corporation*, 323 U. S. 373, 89 L. ed. 311 (1945).

Where the Government occupies land by the overflow of water an implied contract arises to compensate the owner for the value of such taking, which would be cognizable in the Court of Claims.

> *Merriam* v. *United States*, 29 Ct. Cl. 250 (1894); *Pumpelly* v. *Green Bay & Miss. Canal Co.*, 13 Wall. 166, 80 U. S. 166, 181; 20 L. ed. 557.

> "Congress has provided that the United States may be sued in the Court of Claims in any action founded on contract or on the Constitution, and it is established that *whenever the United States seizes private property there is an implied obligation to pay for it.*" (Emphasis supplied.)

> *Smith* v. *Snyder, Secretary of the Treasury*, 181 F. 2d 278 (CA DC, 1950);
> *Pacific Nat. Fire Ins. Co.* v. *Tennessee Valley Authority*, 89 F. Supp. 978 (D. C. Va. 1950).

In *United States* v. *Causby*, 328 U. S. 256, 90 L. ed. 1206, this Court recognized that the Court of Claims has jurisdiction to award compensation for the taking of property

for a public use, and that the measure of such damages is not the Government's gain but rather the value of the owner's loss. The court there held that while the ownership of land could not be extended to the periphery of the universe, counsel for the Government nevertheless conceded that if the flights over respondent's property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment.

Again, in *United States* v. *Dickinson*, 331 U. S. 745, 91 L. ed. 1789, this Court held:

> "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time. *The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action'*—when they are born, whether they proliferate, and when they die." (Emphasis supplied.)

While the court was there dealing with the application of the statute of limitations, "when dealing with a problem which arises under such diverse circumstances (as those with which we are faced in the instant proceeding) procedural rigidities should be avoided" (331 U. S. 749).

By the same token, Petitioner's cause of action should not be rigidly proscribed to the admiralty jurisdiction, particularly when the cause of action sued upon is nonmaritime in fact.

Conclusion.

The court below plainly misconstrued the nature of the cause of action sued upon, and it should be directed to set aside its order of May 4, 1954 granting the Government's

amended motion to dismiss, and ordered to take jurisdiction of this proceeding and render judgment therein in accordance with the principles of law which govern the unlawful taking of property as prohibited by the Fifth Amendment and applicable to contracts which are implied from the facts as they are found to exist upon the submission of the evidence of the parties.

Respectfully submitted,

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Appendix "A".

IN THE

UNITED STATES COURT OF CLAIMS

No. 496-53

(Decided May 4, 1954)

ATLANTIC COAST LINE RAILROAD COMPANY *v.* THE UNITED STATES.

Mr. ROBERT R. FAULKNER, for the plaintiff. Messrs. CHARLES COOK HOWELL and FRANK G. KUBKA, were on the brief.

Mr. WILLIAM T. FOLEY, Jr., with whom was Mr. Assistant Attorney General WARREN E. BURGER, for the defendant. Mr. J. FRANK STALEY was on the brief.

On Defendant's Amended Motion to Dismiss or for Summary Judgment.

LITTLETON, Judge, delivered the opinion of the court:

In this suit plaintiff asserts a claim for wharfage in the amount of $44,750 against vessels owned by the United States which had been bareboat chartered to the East Coast Shipping Company, Inc., hereinafter referred to as the Shipping Company, and placed by that Company at a wharf owned by plaintiff at Jacksonville, Florida. The plaintiff had no ownership interest in the Shipping Company, but did own certain waterfront docks and mooring facilities at Jacksonville, Florida, where the Shipping Company moored the vessels in question.

The case is now before us on defendant's amended motion to dismiss predicated on the grounds that this court lacks jurisdiction over the subject matter and that the petition fails to state a cause of action.[1]

Sometime prior to 1949, the defendant acting through the Navy Department inaugurated the development of its Banana River Naval Air Station on the east coast of Florida. Because the base was not served by rail facilities, the Navy on October 7, 1949, entered into a charter party with the East Coast Shipping Company under which the latter agreed to perform barge service between Jacksonville and the Banana River Base using Government-owned tugs and barges. As so used the vessels were in the Merchant Service. Under the charter defendant leased to the Shipping Company two tugs for a rental of $200 each per month and nine barges at the rate of $30 each per month. The charter, which gave each party a right of termination under certain conditions, was to be for a term of five years and was amended in June 1950, to include six additional barges.

During the furnishing of services by the Shipping Company under the charter, plaintiff's wharf at Jacksonville was used for the docking of the barges in transferring the cargo from railroad cars of plaintiff, the Atlantic Coast Line Railroad Company, to the vessels. No separate wharfage charges were levied by the plaintiff railroad during these operations since the charges were absorbed by the tariffs covering the rail shipments.

On October 4, 1950, because of financial losses, the Shipping Company ceased operations and notified the Navy that it was exercising its right under the charter to terminate it. This notification requested the Navy Department to furnish instructions as to where the Navy wanted the vessels rede-

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[1] Defendant's motion to dismiss as originally filed was based solely on the first mentioned grounds and was later amended to add the defense that the petition failed to state a cause of action. This amended motion as well as plaintiff's reply to it included matters to be considered outside the pleadings. Therefore, pursuant to Rule 16 (b), we treat the present motion as we would a motion for summary judgment.

livered because upon termination the Shipping Company was required to deliver the vessels to ports selected by the Navy.[2] The Navy replied rejecting the right of the Shipping Company to terminate the charter inasmuch as the company was then in default, the Shipping Company having gone into bankruptcy and its properties having passed into the hands of a trustee. However, in order to expedite matters, the Navy informed the company of its election under the terms of the charter to terminate which it was entitled to do upon default by the company. At the same time the Navy directed that certain of the barges be delivered to the Charleston Naval Shipyard and the remaining ones to the United States Naval Base, Green Cove Springs, Florida. The Shipping Company never delivered the barges as directed but left them moored at plaintiff's docks at Jacksonville, Florida.

On October 4, 1950, when the company ceased operations, 12 of the leased barges were moored at plaintiff's wharf and on January 10, 1951, three additional ones were added to the group. All remained at plaintiff's wharf until removed by the Navy on February 19 through 21, 1951. Before removing them, however, the Navy notified the Shipping Company that it was going to repossess the barges because the company had failed to redeliver the vessels as directed, as required under the charter and the written notice given.

Plaintiff, the Atlantic Coast Line Railroad Company, claims wharfage for the period October 4, 1950, through February 21, 1951, from the Government, during which

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[2] Article 17 of the charter provided as follows:

REDELIVERY OF VESSELS.—On or before the expiration or promptly following the termination of this charter party, as the case may be, Charterer at its expense shall redeliver the Vessels in as good condition as when delivered to the Charterer, normal wear and tear excepted, to the locations shown on Schedule 1 hereof or to such other locations, within the Sixth Naval District, as may be designated by the Government, * * * Upon completion by the Charterer of its obligations under this Article, the Government shall execute redelivery certificates covering each of the vessels so redelivered.

time, first 12 and later 15, barges were moored at its wharf at Jacksonville.

The Government's initial defense is a jurisdictional one and rests on the contention that the plaintiff's claim, if any, is a maritime lien or contract, the exclusive remedy for which is a suit in a federal district court under the Suits in Admiralty Act, 46 U. S. C. §741 *et seq.*, 41 Stat. 525. *Matson Navigation Co.* v. *United States,* 284 U. S. 352.

Plaintiff's position is that in order for the Suits in Admiralty Act to be applicable it is necessary that the cause of action be a maritime one arising from the use of the barges as merchant vessels. While admitting that during the operation of the barges under the charter they were employed as merchant vessels, plaintiff urges that their status as merchant vessels came to an end, and they became public vessels, when the Shipping Company ceased operations on October 4, 1950, and thereafter the status of the barges was that of public vessels. We cannot agree. The charters still governed. Plaintiff further contends that after that date the vessels must be considered as having been withdrawn from navigation with the result that any claim that might attach to them would be based on a nonmaritime cause of action outside the realm of admiralty. That is, a contract action. This, plaintiff asserts, was the status of the barges at the time that its right to wharfage accrued, rendering the Suits in Admiralty Act inapplicable. Plaintiff further contends that its cause of action arises under the Tucker Act, 28 U. S. C. §1491, either as a claim for just compensation under the Fifth Amendment for the taking of its property or for damages for breach of a contract implied in fact under which defendant was obligated to reimburse plaintiff for the use of its wharf.

Plaintiff's efforts to recover must fail at the very outset. We are of the opinion that the plaintiff's cause of action, if any, arose as an incident to the employment of the barges as merchant vessels, and they remained merchant vessels until delivered as directed by the Navy, and any claim which plaintiff might have relative to them would be cognizable in the U. S. District Court under the Suits in Admiralty

Act. Such a finding is sufficient to dispose of this case since once found to be a cause of action within that Act the remedy is one which is vested exclusively in the district courts. *Field* v. *United States,* 125 C. Cls. 559, cert. den., 346 U. S. 922, and cases cited therein.

The Suits in Admiralty Act provides in part as follows:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States * * * *provided that such vessel is employed as a merchant vessel* * * *.* Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. [Emphasis supplied.]

Claims for wharfage whether in the nature of a contract or lien have long been recognized as maritime causes of action within the admiralty jurisdiction. *Ex parte Easton,* 95 U. S. 68.

Plaintiff's argument is based on the premise that the stoppage of operations, due to bankruptcy, by the Shipping Company under the charter, coupled with the company's intention to no longer use the barges, was sufficient to convert the barges to public vessels. In so urging, we believe that plaintiff is placing much too narrow construction on the phrase "employed as a merchant vessel" as that term is used in the act. The courts have not applied so narrow a test.

Faced with this identical question under the Suits in Admiralty Act, the Court in *Shewan & Sons, Inc.* v. *United States,* 266 U. S. 108 at 112, stated:

> What then, does the proviso mean? Are the words to be construed as if they read "is being actively

employed as a merchant vessel"? Such a construction is a narrow one and not in accord with the equitable purpose of Congress. The important line between immunity from judicial seizure of Government vessels under the act of 1916[3] was between public vessels and those engaged in merchant service. The mere laying up of a vessel engaged in the latter service would not change its character, unless the Government did something affirmative to make it a public vessel.

This court in *Morse Dry Dock Co.* v. *United States,* 77 C. Cls. 57, applied the rule of the *Shewan* case. There the Government's withdrawal of the vessels from the public service and delivery of them under charter agreements to a shipping company was held to have been a sufficient act on the part of the Government to alter the character of the vessels from public service to merchant service even though the ships had not at the time of the accrual of the cause of action begun active service in the merchant fleet. We find no such comparable act on the part of either party here. Until the Navy completed repossession of the barges and, presumably put them to public use, the barges retained their merchant status. An effective termination by the Navy of the charter required redelivery of the vessels to the Navy, as directed. This was not done. The obligation sued on arose as an incident of the employment of the barges as merchant vessels. We do not regard the Suits in Admiralty Act as requiring active use as a merchant vessel at all times but only that the vessel have a commercial character when the cause of action arose. *Eastern S. S. Lines* v. *United States,* 187 F. 2d 956; *Adams* v. *United States,* 101 F. Supp. 956, affd., 201 F. 2d 150.

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[3] Shipping Act of 1916, 39 Stat. 728. It was a Supreme Court decision under this Act, *The Lake Monroe,* 250 U. S. 246, permitting the attachment and seizure of Government-owned vessels used in the merchant fleet which led to the enactment of the Suits in Admiralty Act.

Nor can we accept plaintiff's contention to the effect that after October 4, 1950, the barges must be regarded as having been withdrawn from navigation with the result that any claim relative to them would be a nonmaritime cause of action outside the admiralty jurisdiction. Cases cited by plaintiff in supporting this contention deal with either vessels under court attachment,[4] vessels which were found to be no longer adapted to further shipping needs,[5] vessels in storage during off-seasons[6] or a vessel's use of a wharf under a leasing contract whereby the owner was liable for the wharfage whether the vessel used the dock or not. These cases present circumstances materially different from those confronting us here.

Plaintiff's claim for wharfage whether in the nature of a contract or lien is one which comes within the purview of the Suits in Admiralty Act, and the exclusive remedy under that Act is a suit in a federal district court. Defendant's amended motion to dismiss is granted and plaintiff's petition is dismissed.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and JONES, *Chief Judge,* concur.

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[4] *Murray* v. *Schwartz,* 175 F. 2d 72; *The Jack-O-Lantern,* 282 F. 899; *The Poznan,* 9 F. 2d 838, revd. 274 U. S. 117.

[5] *The General Lincoln,* 24 F. 2d 441; *The Andrew J. Smith,* 263 F. 1004.

[6] *The Murphy Tugs,* 28 F. 429; *The C. Vanderbilt,* 86 F. 785, affd. 93 F. 986.

[7] *The James T. Furber,* 129 F. 808.

Appendix "B".

(1) Fifth Amendment to the Federal Constitution

AMENDMENT V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(2) Suits in Admiralty Act, 46 U. S. Code, Sec. 741, *et seq.*, 41 Stat. 525.

"SECTION 741. Exemption of United States vessels and cargoes from arrest or seizure.

No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this chapter shall not apply to the Panama Railroad Company. Mar. 9, 1920, c. 95, Section 1, 41 Stat. 525."

"SECTION 742. Libel in personam

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and

possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States. Mar. 9, 1920, c. 95 Section 2, 41 Stat. 525."

"SECTION 743. Procedure in cases of libel in personam

Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or a corporation mentioned in section 741 of this title may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as provided in other cases of admiralty and

maritime jurisdiction. If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation given prior to March 9, 1920, in admiralty causes by the United States or the United States Maritime Commission, shall become void and be surrendered and canceled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 748 of this title. Mar. 9, 1920, c. 95, Section 3, 41 Stat. 526; Ex. Ord. No. 6166, Section 12, June 10, 1933; June 29, 1936, c. 858, Subsections 203, 204, 904, 49 Stat. 1987, 2016."

"SECTION 745. Causes of action for which suits may be brought; limitations; exceptions; actions which may not be revived; interest on claims.

Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided,* That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: *Provided further,* That the limitations contained in this section for the commencement of suits shall not bar any suit against the United States brought hereunder within one year after December 13, 1950, if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improp-

erly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States or against the master of any such vessel: *And provided further,* That after June 30, 1932, no interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized by section 742 of this title unless upon a contract expressly stipulating for the payment of interest. As amended Dec. 13, 1950, c. 1136, 64 Stat. 1112."

(3) Extension of the Admiralty & Maritime Jurisdiction, 46 U. S. Code, Sec. 740, 62 Stat. 496.

"SECTION 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided,* That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948 and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further,* That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage. June 19, 1948, c. 526, 62 Stat. 496."

(4) Act providing for the Jurisdiction of the Court of Claims, 28 U. S. Code, Sec. 1491, 62 Stat. 940.

"SECTION 1491. Claims against United States generally

The United States Court of Claims shall have jurisdiction to render judgment upon any claim against the United States—

(1) founded upon the Constitution; or

(2) founded upon any Act of Congress; or

(3) founded upon any regulation of an executive department; or

(4) founded upon any express or implied contract with the United States; or

(5) for liquidated or unliquidated damages in cases not sounding in tort.

Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority. As amended July 28, 1953, c. 253, Section 7, 67 Stat. 226."

(5) CHAPTER 271.01, Florida Statutes.

"271.01. Grant of submerged lands to riparian owners; proviso

The State of Florida, subject to any inalienable trust under which the state holds all submerged lands and water privileges within its boundaries, divests itself of all right, title and interest to all lands covered by water lying in front of any tract of land owned by the United States or by any person, natural or artificial, or by any municipality, county or governmental corporation under the laws of Florida, lying upon any navigable stream or bay of the sea or harbor, as far as to the edge of the channel; and vests the

full title to the same, subject to said trust in and to the riparian proprietors, giving them the full right and privilege to build wharves into streams or waters of the bay or harbor as far as may be necessary to effect the purposes described, and to fill up from the shore, bank or beach as far as may be desired, not obstructing the channel, but leaving full space for the requirements of commerce, and upon lands so filled in to erect warehouses, dwellings or other buildings and also the right to prevent encroachments of any other person upon all such submerged land in the direction of their lines continued to the channel by bill in chancery or at law, and to have and maintain action of trespass in any court of competent jurisdiction in the state, for any interference with such property, also confirming to the riparian proprietors all improvements which may have heretofore been made upon submerged lands; provided, that the grant herein made shall apply to and affect only those submerged lands which have been, or may be hereafter, actually bulkheaded, filled in, or permanently improved, continuously, from high water mark in the direction of the channel, or as near in the direction of the channel as practicable to equitably distribute the submerged lands, and shall in no wise affect such submerged lands until actually filled in or permanently improved."

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 339

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 39-44) [1] is reprinted as Appendix "A" to the petition and is reported at 120 F. Supp. 917.

JURISDICTION

The judgment of the Court of Claims was entered on May 4, 1954 (R. 39). A motion for rehear-

[1] All page references are to the typewritten "Transcript of Record" filed by petitioner.

ing was overruled on July 13, 1954 (R. 45). The petition for a writ of certiorari was filed on September 13, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1255(1).

QUESTION PRESENTED

Whether a claim against the United States for wharfage for certain government-owned barges is within the admiralty jurisdiction and hence cognizable exclusively in the District Courts under the Suits in Admiralty Act and not in the Court of Claims.

STATUTES INVOLVED

The pertinent provisions of the Suits in Admiralty Act are set forth in the Appendix, *infra,* pp. 14-15.

STATEMENT

This wharfage claim arises from the use by fifteen government-owned barges of petitioner's wharves at Jacksonville, Florida, for the period from October 4, 1950, to February 21, 1951 (R. 1, 3).

During that period, the barges while "owned by the United States" were "under bare-boat charter to the East Coast Shipping Company, Inc., a Florida corporation," pursuant to a charter party entered into on October 7, 1949 (R. 2, 12, 16; Pet. 17).[2] Article 1 of the charter party prescribed a five-year term for the charterer's hire of the fifteen

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[2] A copy of the "Charter Party" between the United States and the East Coast Shipping Company appears at pages 16 to 24 of the typewritten Record.

Navy barges at $30 per month per barge (R. 17, 25, 28; Pet. 17).[3] By giving proper notice, however, the United States, and the charterer, if not then in default, could terminate the charter before the end of the five-year period (R. 19; Pet. 17, 18). In the event of such termination, the charterer was expressly required to redeliver the barges to any locations designated by the Government within the Sixth Naval District (R. 19, 21; Pet. 18). Article 17 further provided that, on "completion by the charterer of its obligations" to redeliver, the Government would execute redelivery certificates (R. 21; Pet. 18). Failure by the charterer to fulfill this or any other obligation of the charter party gave the Government, under Article 18, the right to take possession of the barges (R. 21; Pet. 18).

Petitioner, a common carrier by railroad, serves Jacksonville, where the wharves in question are located (R. 1; Pet. 16). For about a year after the charter party took effect in October 1949, the East Coast Shipping Company (the charterer) operated the barges between Jacksonville and Banana River, Florida, and used petitioner's wharves at Jacksonville for making deliveries of materials from petitioner's railroad cars to the barges (R. 2; Pet. 17). No separate wharfage charges were levied by petitioner against the charterer for this use of the wharves since the charges were absorbed

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[3] The original charter party providing for hire of nine barges, was amended on June 1, 1950, to include six additional barges (R. 2, 25, 28; Pet. 17).

by the tariffs covering the rail shipments (R. 2; Pet. 17).

On October 4, 1950, the charterer, because of financial losses, ceased operations and notified the Navy that it was terminating the charter (R. 30, 40; Pet. 17). The notice did not state that the barges were then moored to petitioner's wharves (R. 30). Since the charterer was then in default, the Navy, as required by the provisions of the charter, rejected the notice of termination (R. 31; Pet. 18). However, "in order to minimize the damages and have the barges returned to it," the Navy, on October 18, 1950, itself served notice of termination and directed the charterer, in accord with its charter party obligations, to redeliver some of the barges to the Charleston Naval Shipyard and the others to a Florida Naval Base (R. 13, 31; Pet. 18). "The Shipping Company [the charterer] never delivered the barges as directed but left them moored at plaintiff's docks at Jacksonville, Florida" (R. 41; Pet. 18).

In February 1951, the Navy, receiving information that the barges were moored at petitioner's wharves and in view of the charterer's failure to redeliver, issued orders to the Commandant, Sixth Naval District, "to immediately repossess the barges and remove them from the plaintiff's wharf" (R. 14, 41). The fifteen barges were removed by the Navy between February 19 and 21, 1951 (R. 14; Pet. 18).

Six months later, on August 23, 1951, petitioner billed the United States for the barges' use of its

wharves at the rate of $25 per day per barge, amounting to a total of $44,750 for the period from October 4, 1950, to February 21, 1951 (R. 5-6). This was the Government's "first written notice from the plaintiff asserting a claim against the Navy for wharfage arising out of plaintiff's dealings with the East Coast Shipping Co., Inc., the charterer" (R. 15).

Payment of the wharfage bill was refused (R. 3). Petitioner then filed this suit in the Court of Claims on August 6, 1953, demanding judgment for $44,750 (R. 1, 4; Pet. 16). The United States moved to dismiss for lack of jurisdiction, asserting that the petition alleged a maritime cause of action for wharfage exclusively within the admiralty jurisdiction of the United States District Courts (R. 9; Pet. 17, 19). This motion was later amended to ask for dismissal on the additional ground that the petition failed to state a cause of action (R. 10; Pet. 17). In a unanimous opinion, holding that any wharfage claim petitioner "might have * * * would be cognizable in the U. S. District Court under the Suits in Admiralty Act" (Pet. 19-20), the Court of Claims granted the motion and dismissed the petition (R. 42, 44; Pet. 16-22).

ARGUMENT

The Court of Claims properly rejected petitioner's contention that it had jurisdiction over the instant wharfage claim. That position is unsound because (a) the District Courts have exclusive jurisdiction over such maritime claims and

(b) there is here involved no implied contract or constitutional "taking" which would permit the Court of Claims to invoke its general jurisdiction. In addition, the petition presents no special or important reason for invoking the discretionary jurisdiction of this Court.

1. The exclusiveness of the jurisdiction of District Courts over maritime claims against the United States cognizable under the Suits in Admiralty Act cannot now be challenged. *Calmar S. S. Corp.* v. *United States,* 345 U. S. 446; *Matson Navigation Co.* v. *United States,* 284 U. S. 352; *Johnson* v. *Fleet Corporation,* 280 U. S. 320; *Fleet Corp.* v. *Rosenberg Bros.,* 276 U. S. 202; *M. & J. Tracy* v. *United States,* 125 C. Cls. 70, certiorari denied, 346 U. S. 854; *Field* v. *United States,* 125 C. Cls. 559, certiorari denied, 346 U. S. 922.[4] In the *Matson* case, this Court, affirming a judgment of the Court of Claims which had dismissed a mari-

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[4] The court below, noting that the Navy barges, bareboat-chartered to the East Coast Shipping Company, were employed by the charterer as merchant vessels, properly ruled that the wharfage claim would be cognizable in the District Courts under the Suits in Admiralty Act, rather than the Public Vessels Act (R. 42-43; Pet. 19-22). But even if the latter Act were deemed applicable, exclusive jurisdiction would still be vested in the District Courts and not in the Court of Claims. The "same reasoning that sustains the holding that the Suits in Admiralty Act affords an exclusive remedy applies to the Public Vessels Act as affording the exclusive remedy for damages arising out of the possession and operation of public vessels not then and there operated as merchant vessels." *Thomason* v. *United States,* 184 F. 2d 105, 108 (C.A. 9); *Jentry* v. *United States,* 73 F. Supp. 899 (S.D. Cal.); cf. *Calmar S.S. Corp.* v. *United States,* 345 U.S. 446, 456, note 8.

time claim for want of jurisdiction, emphasized that jurisdiction over such actions is "vested exclusively in the district courts." 284 U. S. 352, 356-7. And recently in *Calmar* the Court, again rejecting the argument that the Court of Claims could exercise concurrent jurisdiction, reiterated that "the District Courts are, in our judicial system, the accustomed forum in matters of admiralty; everything else being equal, no efforts should be made to divert this type of litigation to judges less experienced in admiralty." 345 U. S. 446, 455.

Petitioner apparently does not question the exclusive jurisdiction of the District Courts over maritime claims against the United States. It does, however, endeavor to avoid the jurisdictional limitation by arguing that the particular "variety" of wharfage claim involved in this case is "non-maritime" (Pet. 8).

Over 75 years ago, this Court noted that "Standard authorities, as well as reason, principle, and the necessities of commerce" compel the conclusion that a wharfage claim is "maritime" in nature and hence "cognizable in the admiralty." *Ex Parte Easton,* 95 U.S. 68, 72, 75-6. Wharfage service is at least as closely tied in with navigation as is stevedoring, a recognized maritime service. *American Stevedores* v. *Porello,* 330 U.S. 446, 456. Indeed, wharfage has been viewed as "well-nigh as essential" to navigation as are ships and vessels themselves. *Ex Parte Easton,* 95 U.S. 68, 75. Accordingly, any wharfage furnished a vessel is "maritime

in its nature," and a "suit to recover wharfage" is within the District Courts' exclusive admiralty jurisdiction. *Braisted* v. *Denton,* 115 Fed. 428, 429, 430 (E.D. N.Y.). And it is for that reason that petitioner itself recently filed another and different wharfage claim in admiralty in a federal district court which had "jurisdiction in the premises" because "said cause is within the maritime and admiralty jurisdiction." *The Atlanta,* 82 F. Supp. 218, 222, 240 (S. D. Ga.).

The two cases relied on by petitioner, *The C. Vanderbilt,* 86 Fed. 785 (E.D. N.Y.), and *Murray* v. *Schwartz,* 175 F. 2d 72 (C.A. 2) (see Pet. 8-10), are in no way opposed to the view that all wharfage claims are maritime in nature and thus within the admiralty jurisdiction. Apart from the fact that these two cases arose in circumstances different from those at bar and are therefore distinguishable for the reasons succinctly set forth in the opinion below (R. 44; Pet. 22), it should be noted that the cases simply stand for the proposition that a wharfage claim cannot ripen into a maritime *lien* as against a laid-up ship.[5] That this is the only fair

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[5] If petitioner had sought to enforce a lien, the two cases might have some relevance in pointing up the need for denying petitioner the lien. But petitioner could not assert a lien in this case. Article 19 of the controlling Charter Party between the United States and the East Coast Shipping Company is entitled *"Liens"* and explicitly provides (R. 21-22):

> Neither the Charterer nor the Master of any of the Vessels shall have the right, power or authority to create, incur or permit to be imposed upon any of the Vessels any liens whatsoever. The Charterer agrees to carry a

reading of the *Vanderbilt* case is made apparent by Judge Thomas' subsequent opinion in *Braisted* v. *Denton,* 115 Fed. 428 (E.D. N.Y.), which dealt with a wharfage claim not based on any lien theory. There, Judge Thomas, in discussing his earlier *Vanderbilt* opinion, points out (115 Fed. 428, 430):

> It was decided by this court in Robinson v. The C. Vanderbilt, 86 Fed. 785, that wharfage furnished to a domestic vessel was maritime in its nature, and the authorities there marshaled

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properly certified copy of this charter party with the papers of each of the Vessels and on demand to exhibit the same to any person having business with any of the Vessels which might give rise to any lien thereon. The Charterer further agrees to fasten and maintain in a conspicuous place on each of the Vessels during the life of this charter party a notice reading as follows:

"This tug (or barge) is under charter from the United States of America, represented by the Chief of the Bureau of Ships of the Department of the Navy, to the East Coast Shipping Co., Inc. and by the terms of said charter neither the Charterer nor the Master has any right, power or authority to create, incur or permit to be imposed upon this tug (or barge) any liens whatsoever."

In this connection, it is significant that the Ship Mortgage Act (Section 30R, 41 Stat. 1005, 46 U.S.C. 973) provides that no lien arises in favor of any person furnishing service to a vessel where "the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party * * * the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor." See also Section 8, Public Vessels Act (43 Stat. 1113, 46 U.S.C. 788), providing that, "Nothing contained in this Act shall be construed to recognize the existence of or as creating a lien against any public vessel of the United States."

may be consulted. Hence this court has jurisdiction in the present action in personam.[6]

2. Petitioner's additional argument is that the Court of Claims should have exercised jurisdiction because the wharfage claim arose out of a contract implied in fact or a Fifth Amendment taking (Pet. 5, 11-12). But this contention can be reached only if petitioner's first argument as to the non-maritime character of its wharfage claim is accepted. If the claim, as we believe, is maritime and hence cognizable in the District Courts under the Suits in Admiralty Act, the exclusiveness of the remedy under the Act precludes resort to any other forum under any other theory of recovery. As noted by the court below, "a finding [that the wharfage claim is maritime and cognizable under the Suits in Admiralty Act] is sufficient to dispose of this case since once found to be a cause of action within that Act the remedy is one which is vested exclusively in the district courts" (R. 42; Pet. 20). See *supra*, pp. 6-7.

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[6] The *Vanderbilt* opinion itself clearly points up the distinction between the maritime nature of the wharfage contract and the availability of a maritime lien (86 Fed. at 788): "At the outstart, it should be noticed that, although wharfage afforded for storage to domestic ships removed from navigation be maritime in its nature, it does not follow that a maritime lien results."

Murray v. *Schwartz*, *supra*, p. 8, involved a claimed non-maritime lien on a "dead ship" and the libellant expressly disavowing reliance on a maritime lien, relied exclusively on a New York state statutory lien provision. The court's ambiguous remarks, quoted at Pet. 8, were therefore plainly *obiter*, even if they be thought broad enough to apply to the present situation.

Even if petitioner's additional argument were reached, it would avail nothing for the wharfage claim did not arise out of a contract implied in fact or out of a taking.

The Tucker Act's provision for actions on implied contracts (28 U.S.C. 1346(a)(2)) is limited, as petitioner recognizes, to contracts implied in fact and does not encompass contracts implied in law. *Alabama* v. *United States,* 282 U.S. 502, 506; *United States* v. *Minn. Investment Co.,* 271 U.S. 212, 217; *Merritt* v. *United States,* 267 U.S. 338, 340, 341; *Sutton* v. *United States,* 256 U.S. 575, 581.

Contracts are "implied in law" when they arise not from any promise or mutual assent but are "imposed by law on the defendant irrespective of, and sometimes in violation of, his intention." 1 Williston, *Contracts* (Rev. Ed. 1936) Sec. 3. Contracts are "implied in fact" when they arise "from mutual agreement and intent to promise but where the agreement and promise have not been expressed in words." *Ibid.* It is significant that the petitions filed in this Court and the Court of Claims do not even allege that the United States knew, prior to its removal of the barges on February 19-21, 1951, that the barges had been moored to petitioner's wharves. Without such knowledge, there could have been no implied assent or promise to reimburse petitioner and therefore no "contract implied in fact."

Equally lacking in merit is the assertion that there was a Fifth Amendment taking. Such a taking, to be compensable, presupposes knowledge,

which we have already shown to be absent, and also requires official authorization for the taking or using of petitioner's wharves. Unless there be such official authorization, there can be no taking in the constitutional sense. *Youngstown Co.* v. *Sawyer,* 343 U.S. 579, 585; *United States* v. *Goltra,* 312 U.S. 203, 208; *United States* v. *North American Co.,* 253 U.S. 330, 333; *United States* v. *Buffalo Pitts Co.,* 234 U.S. 228, 235. Failure on the part of petitioner to show that the use of the wharves was an authorized taking is thus fatal to its claim for just compensation under the Fifth Amendment.

3. The principal question presented by the petition—whether or not the particular wharfage claim here involved is or is not maritime in nature—presents no issue of general importance calling for review here. Nor can general importance be imported into the case by petitioner's request (Pet. 7) for an interpretation by this Court of the Admiralty Extension Act of June 19, 1948 (62 Stat. 496, 46 U.S.C. 740). That Act has no bearing whatever on this case. Far from relying on that Act, the court below and the Government have never suggested its applicability. And petitioner itself concedes that it "could have no possible application" to the instant wharfage claim (Pet. 7).

CONCLUSION

The decision of the Court of Claims is correct. There is no conflict, and the matter is not of general importance. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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OCTOBER 1954

APPENDIX

Sections 1 and 2 of the Suits in Admiralty Act (Act of March 9, 1920, 41 Stat. 525, 46 U.S.C. 741 *et seq.*) provide as follows:

> Sec. 1. That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.
>
> Sec. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the dis-

trict in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

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DENIED